

In re: WINSTON T. GROOVER.
HPA Docket No. 95-0004.
Decision and Order filed June 28, 2000.

Sore – Entering – Showing – Exhibiting.

Administrative Law Judge Dorothea A. Baker dismissed the Complaint with prejudice based upon an evaluation of the record as a whole, and found that the Government has not met its burden of proof.

Colleen A. Carroll, for Complainant.
Brenda A. Bramlett, Shelbyville, Tennessee, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding instituted by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], by the filing of a Complaint on February 17, 1995, under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1825-1831) [hereinafter the Horse Protection Act or "Act"], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under various statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. The Complaint originally included as a Respondent, Marcella Smith.

The Complaint alleges that the Respondent Winston T. Groover was the trainer of the horse known as "Pusher's Night and Day" and entered this horse as Entry No. 454, Class No. 71, on March 27, 1993 at the National Walking Horse Trainers Show at Shelbyville, Tennessee.

The Complaint also alleges that Respondent Marcella Smith was the owner of the horse known as "Pusher's Night and Day" which was entered as Entry No. 454, Class No. 71, on March 27, 1993 at the National Walking Horse Trainers Show at Shelbyville, Tennessee.

The Complaint alleges, with respect to Respondent Groover that, he entered for the purpose of showing or exhibiting the horse known as "Pusher's Night and Day" in the aforesaid National Walking Horse Trainers Show while the horse was sore. The Complaint also alleges that the Respondent Marcella Smith allowed the entry for the purpose of showing or exhibiting of "Pusher's Night and Day" at the aforesaid National Walking Horse Trainers Show while the horse was sore. Said allegations state that the aforesaid Respondents, in so acting, violated section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) inasmuch as the horse was sore at the time.

The Respondent Winston T. Groover, through counsel, filed a timely Answer on April 17, 1995.

This case was assigned to this Administrative Law Judge on November 17, 1997. On October 20, 1997, the Complainant moved to dismiss the Complaint as

to Respondent Marcella Smith because Complainant was unable to serve the Complaint upon her. Pursuant to said Motion, the Complaint was dismissed as to Respondent Marcella Smith by Order issued November 18, 1997.

Pursuant to pleadings properly filed, Respondent Winston T. Groover filed Notice of Substitution of Counsel on his behalf. Said Substitution of Counsel was recognized by Order issued November 18, 1997.

On December 11, 1997, an oral hearing date was designated, in accordance with agreement of the parties, to be July 15, 1998, in Nashville, Tennessee. By reason of Motion therefor, filed by the Respondent and for good cause set forth therein, the oral hearing date of July 15, 1998, was continued until a later date. By document filed January 25, 1999, the oral hearing was rescheduled to commence on June 23, 1999, in Nashville, Tennessee. Pursuant to request therefor by the Complainant that date was changed from June 23, 1999 to July 14, 1999, and July 20, 1999. The oral hearing herein took place on July 20 and 21, 1999, before Administrative Law Judge Dorothea A. Baker at which time documentary evidence and testimonial evidence were received into evidence. The Complainant was represented by Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. Respondent was represented by Brenda A. Bramlett, Esquire, Shelbyville, Tennessee. In due course, and in a timely manner, the parties filed briefs herein, the last brief having been filed April 3, 2000.

Applicable Statutory Provisions

TITLE 15--COMMERCE AND TRADE

....

CHAPTER 44--PROTECTION OF HORSES

15 U. S. C. § 1821(3).

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that--

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in

any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

15 U.S.C. § 1825(b)(1).

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

**(d) Production of witnesses and books, papers, and documents;
depositions; fees; presumptions; jurisdiction**

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

Statement of the Case

The primary issue to be resolved herein is whether or not on March 27, 1993, the Respondent, Winston T. Groover, entered the Horse known as "Pusher's Night and Day" as Entry No. 454, Class No. 71 at the National Walking Horse Trainers Show, at Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)). Respondent admits that, at all times material hereto, he was the trainer of the horse "Pusher's Night and Day" and that he entered same on March 27, 1993, at the National Walking Horse Trainers Show.

Based upon an evaluation of the record as a whole, I find that the Government has not met its burden of proof. Accordingly, the Complaint is dismissed with prejudice.

To prevail, the Complainant must show by a preponderance of evidence that "Pusher's Night and Day" was sore when Respondent entered it in the horse show. In furtherance of that objective, Complainant relies upon the testimony and documentation relating to an examination of the horse by two qualified USDA veterinarians, namely Dr. Lynn P. Bourgeois and Dr. Scott L. Price who examined the horse at the relevant time on March 27, 1993, both of whom found that the horse had been sore in both front feet. Neither of said witnesses had any independent recollection of the examination and relied upon documentation which was admitted into evidence. Complainant would show that both of said USDA veterinarians were experienced and qualified and utilized an examination procedure of the horse which has achieved the approval of the United States Department of Agriculture. That examination procedure, as generally applied, was related in detail during the testimony.

Prior to the USDA's veterinarians' examination, and when the horse was examined by Designated Qualified Person Charles Thomas, at approximately 6:30 p.m., on March 27, 1993, upon Mr. Thomas' palpation of both front pasterns and

finding sensitivity, but not soreness, Mr. Thomas then excused the horse and issued a Designated Qualified Person's ticket for bilateral sensitivity.

The Act provides that a horse that is abnormally sensitive in both front feet is presumed to be sore: "In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. § 1825(d).

Although Complainant indicates it did not rely upon the statutory presumption of soreness, but in fact proved its case by a preponderance of evidence, nevertheless section 2 of the Act defines a sore horse:

. . . .

(3) The term "sore" when used to describe a horse means that--

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given. 15 U.S.C. § 1821

The Government put on evidence to show that "Pusher's Night and Day" exhibited specific areas of his pasterns which were painful when Dr. Bourgeois and Dr. Price, Government employees, palpated them during the preshow examination. Drs. Bourgeois and Price believed that chains would have hit the area that Dr. Bourgeois and Dr. Price found to be painful. Because of the location of the

painful areas, the veterinarians indicated they could reasonably expect that "Pusher's Night and Day" would have been in physical pain if he had been exhibited on March 27, 1993. Both veterinarians concluded that the horse's pain was due to an artificial cause.

Respondent maintains that whether or not the rebuttal presumption found in section 1825(d)(5) is relied upon, the Complainant still has not borne the burden of persuasion. Whether or not that presumption is triggered, the Respondent maintains that he has presented sufficiently convincing and credible testimony from Drs. Ray Miller and Randy Baker, two licensed and qualified veterinarians; Lonnie Messick, Vice-President of the National Horse Show Commission and the head of the Designated Qualified Person program; Designated Qualified Person Charles Thomas; and a videotaped examination performed by Drs. Miller and Baker immediately following the examination conducted by Drs. Bourgeois and Price that show that "Pusher's Night and Day" was not sore on March 27, 1993. I agree with Respondent.

The Government's case depends upon the examination and testimony of two USDA veterinarians: Dr. Scott Price and Dr. Lynn Bourgeois neither of whom had any present recollection of the examination of the horse and both of whom depended upon the notations made during or shortly after their 1993 examination. The United States Department of Agriculture considers such affidavits and report violations as reliable and probative. *In re: Kim Bennett and Mr. and Mrs. David Broderick*, 55 Agric. Dec. 176 (1996).

The term "sensitive" is a term particularly utilized by Designated Qualified Person personnel and is understood to mean any reaction by a walking horse from palpation, meaning any movement in one or both front feet of the horse upon palpation. The term "sensitive" is understood by Designated Qualified Person personnel and walking horse personnel to have a different meaning from the term "sore" as used under the Act. The terms are not synonymous.

It is misleading to suggest that the words "pain" and "sensitive" are synonymous or that bilaterally sore and sensitive are the same thing. The Act clearly requires that a horse be more than sensitive when palpated before considering it sore; it requires that a horse have abnormal bilateral sensitivity. A sensitive horse is not necessarily a sore horse. For instance, a sensitive silly horse--one that is so sensitive that it reacts to any palpation--is not considered a sore horse. It thus is misleading and inaccurate to use the words pain or sore and sensitive as synonyms in describing a horse's response to palpation. The fact that the horse may have had some sensitivity does not necessarily reflect abnormal sensitivity that equates with pain and which the Act requires be demonstratively present bilaterally before it can presume that the horse was sore.

As experienced veterinarians, the opinions of the Complainant's witnesses are entitled to considerable weight. However, in order to give controlling weight to their opinions, they are required, as skilled experts, to clearly set forth the facts on

which they based their opinions. *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990). This is particularly important when the veterinarians are unable to remember their examination. This lack of recall results not only in having to make a determination, whether a horse is sore, based upon such less reliable evidence as affidavits, and also results in handicapping a respondent's effort at cross-examining a veterinarian concerning his examination.

A Designated Qualified Person is an individual who was trained and licensed through the National Horse Show Commission to inspect horses that excel and show throughout the country. The Designated Qualified Person program is certified by the Department of Agriculture and Designated Qualified Persons and veterinary medical officers, employed by the Department of Agriculture, receive the same training to inspect horses for compliance with the Act.

Mr. Charles Thomas was the Designated Qualified Person on duty on March 27, 1993. He had a present recollection of his examination of "Pusher's Night and Day" on March 27, 1993, which horse he examined in his capacity as a Designated Qualified Person. After said examination, Mr. Thomas issued a ticket indicating his findings of "sensitive both feet, left foot outside, right foot front, led okay." Mr. Thomas' understanding of the term "sensitive" when referring to a reaction obtained during digital palpation of a horse was "if any horse moves in any way in any foot, he is excused from competition." He further testified that the definition of the term "sensitive," which Designated Qualified Persons utilize, is "more strict than what the definitions [of sensitive] under the rule book is." During his examination of the subject horse, Mr. Thomas did not observe the horse bobbing his head, shuffling his back feet forward or contracting or rippling his abdominal muscles. Mr. Thomas indicated that "Pusher's Night and Day" was not sore as that term is defined in the Act. (Tr. 366, 384).

Mr. Lonnie Messick, Executive Vice-President of the National Horse Show Commission and head of the Designated Qualified Person program, was present at the horse show inspection station of the trainer show on March 27, 1993. Although he did not recall witnessing the examination of "Pusher's Night and Day" by Designated Qualified Person Charles Thomas or the subsequent examinations of said horse performed by Dr. Bourgeois and Dr. Price, he did observe the examination by Dr. Miller.

According to Mr. Messick, the terms "sensitive" and "sore" as defined under the Act are not synonymous. The definition of "sensitive" utilized by Designated Qualified Person personnel in 1993 was not the same as the meaning of "sore" as that term is defined under the Act. (Tr. 359). Mr. Messick observed Dr. Ray Miller examine "Pusher's Night and Day" on March 27, 1993 and did not see Dr. Miller obtain any reaction or movement to his palpation of said horse's pasterns. (Tr. 344). According to Mr. Messick, Dr. Miller conducted his examination of the horse in question by using the same procedure of palpation that the Designated Qualified Persons use.

"Pusher's Night and Day" was examined by two private veterinarians, Dr. Miller as mentioned above, and Dr. Baker at a distance approximately twenty feet away from where the horses were being checked or just outside the area and was within a time frame of five or ten minutes between the time that Dr. Bourgeois and Dr. Price examined the horse. The examination by the Respondent's two veterinarians occurred at approximately 7:00 p.m., on March 27, 1993, and said examination was videotaped.

At the time of his examination, Dr. Price was upset because the horse was in the warmup- ring area. It is not known whether or not the duties of a USDA veterinarian included the direction and management of the horse show. However, this has been a factor in the Department's Judicial Officer's decisions: namely, where the horse was subsequently examined.

The aforesaid two private veterinarians who inspected the horse and who appeared as witnesses at the hearing are licensed, practicing veterinarians of many years. Based upon their personal examinations, they concluded that "Pusher's Night and Day" was not sore and was not in violation of the Act. Both of these individuals are well-qualified professionals within the ambit of veterinarians' expertise. The fact that they were not employed by the United States Department of Agriculture does not diminish their professional ability. Dr. Baker had a present recollection of his examination of "Pusher's Night and Day" from which examination he concluded that the horse was not sore as that term is defined under the Act. Neither Dr. Price nor Dr. Baker were pre-selected. Rather, they were simply in attendance at the show that night.

The probative value of the testimony of the two USDA Inspectors is diminished by certain discrepancies in their testimony and documentation such as time of filling out Form 7077; findings relating to indicia of soring and time of examination. The requirement of accuracy is not met here as there are notable discrepancies between the recollections of Dr. Bourgeois, as recorded by him on Form 7077 and stated in his affidavit, and the recollections of Dr. Price. (CX 1, 4-5). Not only did Dr. Price see alleged responses by "Pusher's Night and Day" that Dr. Bourgeois did not see; Dr. Price, in his affidavit, recalls "we witnessed Ronnie Messick (sic), DQP Supervisor, palpating the horse outside the DQP inspection area in the warm-up ring." (CX 5). He further states that he saw a total of three (3) persons examine the horse after he and Dr. Bourgeois completed their examination. (CX 5). Dr. Bourgeois, on the other hand, does not have a recorded recollection of seeing Lonnie Messick examine said horse. (CX 4). In fact, Dr. Bourgeois specifically notes that he saw two (2) veterinarians examine the horse in question while some person videotaped their examinations. (CX 4). Dr. Bourgeois recalls Lonnie Messick witnessing the examinations by the two (2) veterinarians but nothing more. (CX 4).

Further, when asked "Can you tell from your documentation whether the responses that this horse gave you were the results of artificial means?", Dr. Price

responded "In my affidavit, it's concluded that these areas were sore because of chemicals, action devices or the combination of the two." (Tr. 102:11-16). The fact is that Dr. Price made no mention in his affidavit as to what caused "Pusher's Night and Day" to be allegedly sore. (CX 5).

There also was a reluctance to explain the basis of opinion of the two USDA Inspectors:

Q You didn't answer my question, Doctor. [Bourgeois] Would you agree or disagree that there is a difference in the definition of sensitivity --

A Yes, there is a difference.

Q Could you explain it?

A I don't have a dictionary. To us, sensitivity is not part of our vocabulary. It's not reaction to foundation. [palpation??]

Q Pardon me? Would you repeat that?

A No, I won't. (Tr. 56:2-11).

* * * * *

Q And you did not include it in form 7077 and horse shuffled his feet forward.

A Right.

Q Isn't that a direct contradiction of what you are saying?

A No.

Q Explain that, please.

A The horse is moving back on his feet. He is trying to redistribute his weight. It may be an omission, but it's what it was.

Q How does a horse rock back on his hind feet and at the same time shuffle forward?

A Can't.

Q Can you explain that?

A Shuffle and lean back -- he can do it.

Q But you agree there are discrepancies in the form you filled out, form 7077 and your affidavit?

A I agree. (Tr. 58:10-25; 59:1-2).

Also, Dr. Bourgeois, in a description of his examination:

Q Doctor, in your affidavit, you had stated that you palpated both front pasterns of this horse and you got pain responses; is that correct?

A Yes.

Q Do you recall whether or not -- or how many times you examined each foot and by that, I mean, did you check the horse's foot, put it down and go to the other foot?

A I don't recall, but I am sure I didn't.

Q Is that not your normal procedure?

A My normal procedure is to make a decision and then I don't go from foot to foot and back and forth and all that stuff. (Tr. 65:22-25; 66:1-8).

Dr. Price attributed any discrepancies in Form 7077 as attributable to which side of the horse one might be on. Dr. Price does not separate the term sensitive or sore. "Its identical." (Tr. 119).

It is misleading to attempt to equate the validity of the veterinarians' opinions with the number of horses physically examined. The important focus must relate to the professional qualifications, experience, and training required to arrive at a correct diagnosis of the horse's condition at the time of the physical examination. If the Government's position is that only those veterinarians who are employees of USDA are qualified to determine if a horse is sore within the meaning of the Act, then the hearing process is a futile undertaking. Although Congress, through legislation, seeks to abolish the cruel and inhumane practice of soring horses, it likewise, provides for a full and fair hearing where USDA evidence can be disputed. Private licensed veterinarians can be equally qualified and experienced in detecting the presence of soreness in a horse. To maintain otherwise is to cast dispersions on the capability of all such individuals.

It is argued that the Respondent's two examining veterinarians relied upon erroneous criteria in arriving at their opinions that the horse was not sore -- namely, requiring a gait deficit in addition to pain.

Dr. Ray Miller is a Tennessee licensed, practicing veterinarian for the past thirty years. (Tr. 208:1-6). The majority of his practice deals with equine. (Tr. 208:13-16). Dr. Miller knows how to identify a horse that is "sore" and considers himself an expert in determining when a horse is "sore." (Tr. 209:11-17; 229:23-25; 230:1). Dr. Miller had a present recollection of his examination of "Pusher's Night and Day" on March 27, 1993, which exam took place "a little before 7:00". (Tr. 219:15-19, 25; 220:1-2). The examination took place "probably 50 feet from the DQP and the VMO inspection area. . . ." (Tr. 221:2-4). Dr. Miller knew that his examination of said horse was being videotaped. (Tr. 221:12-14). Dr. Miller used the same procedure of palpation on "Pusher's Night and Day" as the Designated Qualified Person used. (Tr. 345:20-24). According to Dr. Miller, and based upon his personal examination of said horse, "Pusher's Night and Day" was not in violation of the Act and "was not sore." (Tr. 226:12-19). Dr. Miller's examination of "Pusher's Night and Day is videotaped in its entirety. (RX 1).

Whether or not the affidavits and inspection reports generated by Drs. Bourgeois and Price constitute hearsay, which is not excluded in administrative proceedings, or constitute recorded recollection, said documentation lacks probative persuasion in light of Respondent's evidence. Past recollection recorded must show reliability and accuracy with respect to the testimony and other data relied upon in connection therewith. There is an insufficiency of evidence to support a finding of a presumption of soreness. Specifically, the portion of Form 7077 completed by Dr. Bourgeois and Dr. Price contained numerous inconsistencies. Also, the testimony of Dr. Bourgeois and Dr. Price was that Dr. Price denied any difference in meaning of the terms "sensitive" and "sore" whereas Dr. Bourgeois, to the contrary, agreed that there was a difference in meaning of the two terms.

The only evidence submitted by Complainant consists of the testimony of the two examining veterinarians, the violation report, and affidavits which indicated that the horse was sore on the night in question. This is not sufficient to carry its burden of persuasion. The Respondent has submitted reliable and credible evidence that said horse was not sore: Mr. Charles Thomas, the Designated Qualified Person who conducted the preshow inspection of "Pusher's Night and Day" on March 27, 1993 did not find said horse sore as that term is defined under the Act; Lonnie Messick, Vice-President of the National Horse Show Commission and head of the Designated Qualified Person program had a present recollection of Dr. Ray Miller's examination of "Pusher's Night and Day" on March 27, 1993. Mr. Messick observed said horse gave no reaction or pain responses as Dr. Miller examined him which indicates the horse was not sore. Further, Mr. Messick testified that the examinations performed by Dr. Miller and Dr. Baker were

performed in a manner consistent with that of a Designated Qualified Person. On March 27, 1993, Dr. Ray Miller and Dr. Randy Baker examined "Pusher's Night and Day" within close proximity to the location of the horse inspection area and within a short period of time of the examinations conducted by Drs. Bourgeois and Price. Both Dr. Miller and Dr. Baker determined that said horse was not sore as that term is defined under the Act. A videotape documented the examinations of Dr. Miller and Dr. Baker and said videotape corroborates the findings of Drs. Miller and Baker that "Pusher's Night and Day" was not sore.

I have found the testimony of Drs. Miller and Baker to be entirely credible. They both were qualified to determine whether "Pusher's Night and Day" was sore. On the other hand, I find it disturbing that one of Complainant's witnesses, demonstrated noticeable agitation when being cross-examined and resented being cross-examined:

Q Doctor, what I am asking actually is what percentage of your time is actually spent enforcing the Horse Protection Act?

A I would say 20 to 25 percent.

Q How do you come up with that figure?

A This is getting ridiculous. It's an approximation, okay? Further than that I can't tell you. I don't know. (Tr. 37:5-12).

* * * * *

A I can't answer that. I don't have the documentation. I can't answer that. I can't. I just don't know. I'd have to go through my weekly reports. I didn't think I was on trial here. I thought it was someone else. (Tr. 38:11-14).

* * * * *

MS. BRAMLETT: Well, Your Honor, he has already testified that from 1980 to 1988, he spent 20 to 25 percent of his time with the VMOs inspecting horses, but that included time spent in office, attending court proceedings and he could not give me an estimate of what actual on hand experience checking horses in that time.

JUDGE BAKER: Very well.

MS. BRAMLETT: From 1988 to 1993 I am asking the exact same

questions. (Tr. 40:17-25).

JUDGE BAKER: Very well, I think the significance becomes apparent.

BY MS. BRAMLETT:

Q Is there --

A I'm not going to lie to you. I don't know the answer. I am not going to perjure myself. (Tr. 41:1-6).

* * * * *

BY MS. BRAMLETT:

Q Have you ever been on the training committee?

A No.

Q Have you had as much experience as Dr. Given?

MS. CARROLL: Objection, relevance. We are getting a little far afield.

JUDGE BAKER: Do you wish to respond, Ms. Bramlett?

MS. BRAMLETT: Your Honor, actually what I am getting at is --

THE WITNESS: This is ridiculous. I can't answer that question. (Tr. 46:15 to 25; 47:1).

Respondent has shown by credible evidence a sufficient basis of rebuttable evidence as to cause the Complainant's evidence to lack the necessary preponderance of proof necessary to carry its burden.

Dr. Price's opinion in this case is subject to strict scrutinization in connection with his actions to have "Pusher's Night and Day" removed from the warmup inspection area. It could be inferred that Dr. Price was aware of the Judicial Officer's rulings concerning examinations of horses that were removed from the vicinity of the inspection area before being examined by independent experts of a respondent. The record does not disclose that Dr. Price's duties included that of show management. It is true that the Judicial Officer has considered this matter.

One of those cases is that of *Richard L. Thornton et al.*, 41 Agric Dec. 870, wherein it is stated by the Judicial Officer, among other things: "These examinations occurring the following morning and one week later are not accorded the same probative weight that is given to examinations immediately following the horse's exit from the show ring. After the horse has departed from the USDA inspection station, the opportunity to anesthetize or alter the situation tends to diminish the probative value. If the horse was sore, the individuals responsible would have little or no hesitancy to try to conceal it." *Albert Lee Rowland and C. H. Meadows*, 40 Agric. Dec. 1934.

Here we have a situation where, as opposed to the testimony and documentation of two USDA Inspectors, we have four credible witnesses contradicting the Inspector's opinions that "Pusher's Night and Day" was sore. Said horse has been shown fairly regularly since he was two-years old in approximately 1989-1990. At the time of the hearing in July, 1999, the horse was still showing.

Certainly, Congress in its wisdom, wanted an accused Respondent to have the opportunity to refute Governmental assertions. Here the Respondent has done so.

All request, motions and suggestions of the parties have been carefully considered. To the extent, if any, they are inconsistent with this Decision and Order, they are denied.

Accordingly, the following Order is issued.

Order

The Complaint filed February 17, 1995, is dismissed with prejudice.

This Decision and Order shall become final and effective thirty-five (35) days after service, unless appealed within thirty (30) days after service to the Judicial Officer pursuant to the Rules of Practice, 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 10, 2000.-Editor]
